

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:14-cv-14176-ADB

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5 STUDENTS FOR FAIR ADMISSIONS, INC.,
Plaintiff

6

7 vs.

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9 PRESIDENT AND FELLOWS OF HARVARD COLLEGE, et al
Defendants

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13 For Zoom Hearing Before:
14 Judge Allison D. Burroughs

15 Status Conference

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17 United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Friday, December 9, 2022

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1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Civil Action 14-14176, Students for
4 Fair Admissions versus President and Fellows of Harvard
5 College, et al. Would counsel identify themselves for
6 the record.

7 MR. MORTARA: This is Adam Mortara for Student For
8 Fair Admissions, with me is my colleague, Patrick
9 Strawbridge of Consenvoy McCarthy.

10 MS. ELLSWORTH: Felicia Ellsworth and Michelle
11 Sander of Wilmer Hale, and for Harvard is Ara
12 Gershengorn from the Office of General Counsel at
13 Harvard.

14 THE COURT: Okay.

15 So, guys, I just got back from a meeting last
16 night and I read your submissions, but what I did not
17 have time to do is go back and look at each page of the
18 transcript to which the letters correspond. So, um, I
19 guess my apologies for my semipreparation today. But I
20 know you both had additional arguments to make that
21 wasn't contained in the letters, so I thought that we
22 could do that today and then I could circle back on any
23 transcripts that weren't -- that were still not agreed
24 to.

25 Let me just see if I can take, um, a couple of

1 these. There were some that -- and I don't know who is
2 going to talk, Mr. Strawbridge or Mr. Mortara, either
3 one of you, but SFFA didn't seem to respond to. As an
4 example the discussion -- this is on Day 9, like I think
5 it's a 23 -9 --

6 MR. MORTARA: Yes, your Honor, Mr. Strawbridge can
7 speak to that.

8 THE COURT: So that's the one about the mom
9 getting surgery, where the mom lives, all of that?

10 MR. STRAWBRIDGE: Yes, your Honor.

11 The reason we didn't respond to that is we had
12 conferred with Harvard's counsel before, we had checked
13 with Mr. Arcidiacano and he did not feel that that
14 needed to be sealed, um, and so we informed Harvard that
15 we did not think that that was necessary to keep that
16 under seal. I did not realize they were still going to
17 seek to seal it, so, um, that's the only reason it
18 wasn't in our letter.

19 THE COURT: So, Ms. Ellsworth, given the position
20 of the witness, do you still want that sealed?

21 MS. ELLSWORTH: Yeah, we thought it was consistent
22 with the position we're taking that family member
23 medical information should be sealed. So from our
24 perspective that should remain sealed as well. If the
25 witness doesn't object and SFFA doesn't object, we don't

1 have a problem with it remaining public, but from a sort
2 of consistency point of view we thought it was the same
3 argument as to why that should remain sealed.

4 THE COURT: All right. Well if he doesn't care,
5 I'm going to unseal that.

6 And then, Ms. Sander, there's one other one.

7 Let's see. (Reads.) I thought there was one other one
8 that SFFA didn't respond to.

9 (Pause.)

10 All right. Ms. Ellsworth, on, um, Day 12, 6-20 to
11 7-1, um, what's the rationale on keeping that sealed
12 since it has no identifying information?

13 MS. ELLSWORTH: It's a specific reference to --
14 no, it doesn't have any identifying information, but in
15 connection with the surrounding conversation that this
16 is an e-mail somebody sent to Dean Karona, we thought it
17 could become clear at least to that individual, um, what
18 this was about. I agree it doesn't reveal any specific
19 information. But the context we thought brought it a
20 little closer to the line of somebody realizing that
21 they were being discussed about in court.

22 So it's not -- it really doesn't have to do with
23 what surrounds it as much as the fact that it actually
24 exposes the name and identity of an applicant.

25 THE COURT: All right, I have to go back and take

1 a look at that. Um --

2 MR. STRAWBRIDGE: I'll just briefly say, your
3 Honor, not to bother the point too much.

4 THE COURT: Go ahead.

5 MR. STRAWBRIDGE: But because it -- obviously
6 students prepare applications and I think your Honor and
7 Harvard are in agreement that an applicant identifying
8 information should remain private, but, um, you know we
9 think that stuff that's close to the line is probably
10 not going to be sufficient under the standard that
11 applies here. And that -- and I think we're in
12 agreement that it's not actually identifying. So your
13 Honor obviously will take a look and make your decision,
14 but that's our view.

15 THE COURT: Yeah, I'm inclined to agree with you
16 but I just want to take a look at it before I rule on
17 it.

18 MR. STRAWBRIDGE: Understood.

19 THE COURT: What did we start off with under seal,
20 is it 175 pages? Do I remember that right?

21 MS. ELLSWORTH: It's 175 or 140. Let me just
22 double-check here. In terms of the sidebars. There's
23 145 pages of sealed sidebars.

24 THE COURT: All right. And given -- how many
25 pages continue to be in dispute?

1 MS. ELLSWORTH: I'd have to count them up, your
2 Honor.

3 THE COURT: All right. I just thought someone
4 might know.

5 MS. ELLSWORTH: Numbers on the fly is not my
6 strong point.

7 THE COURT: No, you don't need to count the
8 number. I'm just trying to figure out what percentage
9 has been agreed to now and what's left?

10 Are we left with a small chunk or a big chunk?

11 MS. ELLSWORTH: Small, I think it's between 25 and
12 30 pages, but not the entirety of each of those pages.
13 We'd be happy to submit sort of a highlighted version of
14 this if that would aid your review, we could send that
15 by e-mail or submit it under seal.

16 THE COURT: I was going to have my law clerks do
17 it and I'm happy to have my law clerks do it, unless you
18 guys have already done it.

19 MS. ELLSWORTH: We have already done it. And we
20 shared that with SFFA. We're happy to send that in.

21 THE COURT: Mr. Strawbridge and Mr. Mortara, are
22 you guys okay with them sharing that so I don't have to
23 --

24 MR. MORTARA: That's absolutely fine with us, your
25 Honor. The remaining materials I think falls into only

1 three sort of subject matters that are scattered across
2 the transcripts.

3 THE COURT: All right. So how are you putting
4 those?

5 MR. MORTARA: There's an exchange with the Office
6 of Civil Rights at the Department of Education.

7 THE COURT: Yeah, the OCR discussion.

8 MR. MORTARA: There's, um -- and I will try to be
9 objective about it. There is the mistaken
10 factually-erroneous testimony given by various Harvard
11 witnesses about the documentation of the use of race at
12 the Harvard admissions office necessitating their return
13 to court and various discussions of that including a
14 discussion about the fact that at least one of Harvard's
15 lawyers knew that those statements were false when they
16 were made. We'll call that the McGraw Fitzsimmons
17 discussion.

18 And then there is of course the very serious
19 allegation made by Mr. Lee that I took advantage of the
20 suicide of Dean Karonna's brother in cross-examining him,
21 including Mr. Lee's statement that it was so public that
22 you could find in it Google in two seconds, your Honor's
23 later statement a couple of days later that that was not
24 in fact the case, and subsequent to that, confusingly to
25 me, Harvard is still saying this is private information,

1 Dean Karona penned a 2019 article in the Harvard Crimson
2 discussing his brother's suicide. I don't understand
3 how it's private. I'm really confused about this one.

4 THE COURT: Okay. So I have basically the same
5 three categories that you do. I just want to make sure
6 we're on the same page about that.

7 Ms. Ellsworth, is that a fair characterization
8 from your perspective?

9 MS. ELLSWORTH: Yes. Well I don't know if it's a
10 fair characterization.

11 THE COURT: We have the other three groups of
12 evidence that are left.

13 MS. ELLSWORTH: If they're accurate, yes.

14 THE COURT: Okay.

15 So, um, let's start with Dean Karona because that
16 does seem to be the most straightforward.

17 Is that -- I don't think that's private
18 information anymore, but I take it you're feeling that's
19 consistent with your general view about personal
20 information, like the, um, is that where we are on this?

21 MS. ELLSWORTH: That's correct, your Honor. It is
22 true that Dean Karona has been written about this
23 publicly, I think the privacy interests here is that of
24 Dean Karona and his family and the discussions
25 surrounding it at the sidebar which is different than a

1 self-authored sort of discussion about what that means
2 to him. So I think it's different in kind from the fact
3 of the information. The fact may have been public, we
4 said that at the time, it's true again now, the
5 discussion surrounding it, and this is the discussion of
6 the impact that may have had on Dean Karona when that
7 was brought up is -- that's just different in kind from
8 the fact that the information itself is public. And so
9 we think it should remain under seal to protect Dean
10 Karona and his family's privacy interests.

11 THE COURT: All right, I'm going to take a look at
12 that again but, um, because I can't remember -- if it's
13 just the fact of the suicide, I tend to agree with
14 Mr. Strawbridge and Mr. Mortara. But, um, I can't
15 remember exactly what was disclosed in a more subjective
16 way about that, so I'll go back and take a look at that
17 as well.

18 MR. MORTARA: Please do, your Honor.

19 MS. ELLSWORTH: What's discussed is the impact the
20 questioning about that may have had on Dean Karona.

21 I also would just sort of point out that the
22 relevance to this case of that information is, as we
23 discussed at the sidebar and remains to be the case, is
24 lacking, altogether lacking, and so that's part of the
25 inquiry that I think the Court has to undertake in

1 determining whether it should remain under seal.

2 THE COURT: I mean do you think that relevance is
3 it part of the inquiry?

4 MS. ELLSWORTH: I think an important part of the
5 inquiry. I think there's a sliding scale of importance
6 of the case to the public as well as protecting privacy
7 interests, it's a balancing, and that's within your
8 discretion as you know.

9 MR. MORTARA: Your Honor, may I speak?

10 THE COURT: Yup.

11 MR. MORTARA: Your Honor, I can almost understand,
12 your Honor makes one comment about your Honor's
13 perception of Dean Karona's demeanor that first day, I
14 could almost understand that comment being sealed.
15 Almost. I don't think it should. But I can almost
16 understand that. I fail to understand how a frankly
17 reckless and false allegation made about me by Mr. Lee
18 needs to be kept under seal when he is the one who made
19 it. He called us the night before and told us about
20 this. We told him straight up that we had no idea about
21 this. He brings it into court. He puts it on the
22 transcript. He says things that are untrue. And then
23 later on, your Honor, you point out that some of the
24 things he said are untrue. I'm totally baffled as to
25 how a false allegation made about me personally and an

1 attack on my integrity and then a later statement by the
2 Court that one of the things that Mr. Lee said is not
3 true is somehow personal private information of Dean
4 Karona's.

5 Your Honor, a last point. I could ask routinely
6 questions about the trial and questions about, for
7 example, my opinion of Mr. Lee. I have always taken the
8 position that I cannot disclose what occurred that day
9 because it was under seal. If it remains under seal, I
10 would like to know whether I am operating under a prior
11 restraint?

12 THE COURT: All right, you just completely lost
13 me, Mr. Mortara. Are we still talking about the suicide
14 in Dean Karona's family?

15 MR. MORTARA: We are indeed. You'll recall that
16 Mr. Lee came into court and he said I had, knowing about
17 Dean Karona's brother's suicide, taken advantage of it
18 in my cross-examination. He said it was the first thing
19 that came up in Google.

20 And I told your Honor that I didn't know. I in
21 fact waived work product, showed my outline, did an
22 extended description for you and Ms. Folan and Ms. Daly
23 about how I had no idea, expressed my personal view
24 about how I had personal experience with suicide and
25 would never do such a thing. Your Honor accepted my

1 representation. Two days later your Honor came back and
2 made a comment to Mr. Lee that it was not in fact the
3 first thing that would come up in Google and it took you
4 a long time to find out about it. And that is amongst
5 the material Harvard thinks should remain sealed and we
6 do not.

7 THE COURT: Okay, this is, um -- so you -- you
8 just referenced -- what I have is a, um -- I have just a
9 sketchy outline of what's contained where.

10 MR. MORTARA: Page 7, Pages 6 to 12.

11 THE COURT: Okay, so that's what I have, Pages 6
12 to 12. So there's no other -- what you just said -- you
13 just mentioned two different days, and I have -- the
14 whole portion of what Harvard wants to keep sealed is
15 taking place on Day 7?

16 MR. MORTARA: Day 9, Page 15, Lines 10 to 14, is
17 when your Honor comes back and points out to Mr. Lee
18 that he had said something that was inaccurate, which
19 was that it was easy to find on Google.

20 THE COURT: Oh, right, I see it.

21 MR. MORTARA: There is also one sentence on Day 9,
22 Page 18, Line 13, that is about the same subject matter.

23 THE COURT: Okay, so those are the three places.
24 I will take a look at that.

25 MR. MORTARA: Thank you, your Honor.

1 THE COURT: All right, so that's Karona. And now,
2 um, you want to move on? Anyone have anything else you
3 want to say about that or do you want to move on to the
4 OCR stuff?

5 MS. ELLSWORTH: No, your Honor, you'll read the
6 transcript and make your own determination.

7 THE COURT: All right. Um, who wants to be heard
8 first on the OCR?

9 MS. ELLSWORTH: I'm happy to go first, your Honor,
10 since we're the ones trying to keep it under seal here.

11 THE COURT: All right.

12 MS. ELLSWORTH: Your Honor, so if you recall
13 there's a lot of the transcript that actually covered
14 this because it was revisited several times. I know
15 Mr. Mortara and Mr. Strawbridge will make the point that
16 the exhibit in question was obtained via a public
17 records request and so it's a document that could be
18 made public. I don't take a position on that. What I'm
19 talking about and what we seek to maintain under seal is
20 the entirety of the discussion in which various
21 characterizations about what the reaction of Dean
22 Fitzsimmons was to an e-mail that was sent to him by an
23 individual who wasn't called to be a witness, that was
24 certainly hearsay, there are a lot of different
25 characterizations of the exhibit, and ultimately your

1 Honor kept it out on a variety of grounds including
2 under 403, but primarily because it had no relevancy
3 issue in this trial.

4 THE COURT: Let me just interrupt here. Just so
5 I'm clear, this is Day 3, Day 10, and, um --

6 MS. ELLSWORTH: Day 14.

7 THE COURT: Day 14. Okay, those are the only
8 three references on that, that those are all the ones
9 that pertain to this?

10 MS. ELLSWORTH: There is one stray reference to
11 it, I believe, it's actually mistranscribed, but we
12 propose redacting it anyway, um, and that is --

13 MR. MORTARA: It's Day 14, 199.

14 MS. ELLSWORTH: Day 14.

15 THE COURT: Okay, so that we have Day 3, Day 10.
16 And is there more than one reference on Day 14?

17 MS. ELLSWORTH: It's one word on Page 199 of Day
18 14.

19 THE COURT: Okay.

20 MR. MORTARA: But there's also the stuff at 198.

21 THE COURT: 198. What I have is Lines 1 through 3
22 and Lines 19 through 20. Are both of those references
23 to the OCR?

24 MS. ELLSWORTH: Yes, that's correct.

25 THE COURT: Okay. All right. Sorry to interrupt,

1 Ms. Ellsworth. Go ahead.

2 MS. ELLSWORTH: No, no, that's fine, I'm sorry,
3 thank you for setting me straight on which pages we're
4 talking about.

5 So we think it's prejudicial to Harvard and to
6 Dean Fitzsimmons to have this unsealed, particularly
7 given the Court's ruling, um, and the discussion as the
8 only reason for its potential use was for the press
9 gallery, that was the reason it was kept under seal in
10 the first place. I think those concerns still exist,
11 not just because of the possibility of the case making
12 its way back to the Court, which may or may not happen,
13 but because of the increased or the continuing public
14 attention on this case.

15 So I think allowing this whole -- these portions
16 of the sidebars in which there's a lot of accusations
17 made and about what Dean Fitzsimmons's response meant or
18 didn't mean, um, about what was meant or not meant by
19 the statement by Mr. Hudin, who of course wasn't there
20 to be cross-examined and isn't -- and also has his own
21 privacy interest in this. And there's another
22 individual who's an admission's office employee who's
23 referenced in the sidebar discussions. There's just a
24 lot of discussions about individuals here that have
25 again no relevance to the case, no probative value, as

1 the Court found, or at least the probative value to the
2 extent this had any was outweighed by the prejudicial
3 effect on Harvard and on the trial, and that prejudicial
4 effect again was the public release of it, not the way
5 in which you would consider it in evidence, but rather
6 the release of that information publicly.

7 So again looking to the sliding scale of
8 importance versus the private interests that exist in
9 maintaining it under seal, we think the entirety of
10 those discussions should remain under seal.

11 THE COURT: All right. Mr. Strawbridge or
12 Mr. Mortara?

13 MR. STRAWBRIDGE: I'll handle this one, your
14 Honor.

15 THE COURT: Okay.

16 MR. STRAWBRIDGE: I think you anticipated somewhat
17 what the argument was going to be, which is simply that
18 the evidentiary standard is not the standard for
19 releasing it for purposes of -- especially once you have
20 an objection and a request on the record, um, like you
21 have now. Evidentiary arguments are not, you know,
22 based upon the First Amendment or based on a common
23 access right to the press. Obviously prejudicial
24 information is bantered about in appellate opinions and
25 in open court, um, presumably outside the presence of

1 the factfinder but not outside the presence of the media
2 or the press or the public. And given the fact that all
3 these documents actually involve exchanges with public
4 officials, like we said, you know they're obtained via a
5 FOIA request, I just don't understand how this could
6 possibly satisfy the standard for sealing it, given how
7 heavy that standard is.

8 Lawyers make arguments all the time, lawyers may
9 characterizations of individuals all the time, it may or
10 may not have a role in terms of going to the factfinder
11 or being admitted into evidence, but it's a completely
12 distinct question and a much heavier burden once there's
13 a claim of press access involved. And so that's our
14 position on that.

15 And obviously the same prior restraint that
16 Mr. Mortara referenced would seem to apply here. This
17 is somehow so prejudicial that the order that they not
18 to turn it over to the press, that seems like a whole
19 other ball of wax and is not how we understood your
20 Honor's order today.

21 THE COURT: Mr. Mortara was just waiting to pull
22 out that prior restraint argument.

23 MR. MORTARA: Well, your Honor, it is honestly
24 extremely important to me.

25 THE COURT: I hear you. I hear you.

1 MR. MORTARA: I have layed silent about something
2 that I feel very very strongly about for over four
3 years, and I would like to not be silent about it
4 anymore.

5 THE COURT: We all recognize how difficult being
6 silent must be for you on this subject.

7 MR. MORTARA: Particularly on the issue of
8 Mr. Lee's false allegations.

9 THE COURT: I hear you on that. All right.

10 MS. ELLSWORTH: I'll remind everyone on the call
11 about local release 3.2, um, they can look it up
12 afterwards.

13 THE COURT: I have to go look that up,
14 Ms. Ellsworth.

15 MS. ELLSWORTH: It has to do with attorneys
16 commenting on witnesses or counsel on --

17 MR. MORTARA: Wow, would that have applied to the
18 original allegation about Dean Karona, Ms. Ellsworth?

19 THE COURT: Um, she doesn't need to answer that.
20 We're all going to assume that was a rhetorical
21 question. But I hear you, Mr. Mortara.

22 All right. The last one is, um, the McGraff-
23 Fitzsimmons dispute or whatever you want to call it.
24 Um, do you want to -- Ms. Ellsworth, do you want to go
25 first on that?

1 MS. ELLSWORTH: Yeah, and part of -- I mean the --
2 I'm not sure we should so characterize it, there are
3 other witnesses who were not ultimately recalled,
4 ultimately Dean Fitzsimmons was also not recalled, but
5 that's a choice, that only Director McGraf was
6 ultimately recalled in connection with this.

7 I recognize that the allegations have been made,
8 um, numerous times. We tried to be judicious in what we
9 thought should remain redacted, just certain lines of
10 some of the sidebars in which allegations about
11 untruthfulness are made, um, about both these witnesses
12 and about -- sometimes about counsel, and I hear some
13 more allegations like that today. I don't think that
14 those allegations have any place, um, in the court.

15 But putting that aside, I don't think that there's
16 any relevance to having that information released
17 publicly. There's a lot of standing about accusations
18 that doesn't seem to be important for the press to have.
19 And ultimately the witnesses that were recalled were
20 allowed to be questioned about their prior testimony and
21 about the testimony that they subsequently made, your
22 Honor found that in the opinion, and the First Circuit
23 has agreed that that was not a reason to rule any
24 differently in terms of on the merits of the case. The
25 change in reading procedures was -- was treated by both

1 the appellate court and by this Court and in supporting
2 Harvard's position here.

3 So I think these are specific allegations about
4 specific witnesses, one of whom is now retired from
5 Harvard, um, their reputation for truthfulness, and we
6 think their privacy interests, and in particular the two
7 witnesses, Sharmine Kim and Chris Luvy, who were not
8 ultimately recalled and who I don't believe were called
9 out by name in Mr. Mortara's argument, and that that
10 information should remain sealed to protect the privacy
11 interests of those individuals.

12 THE COURT: Mr. Mortara? Mr. Strawbridge?

13 MR. MORTARA: Your Honor, again I think I would
14 echo Mr. Strawbridge here, I don't understand how this
15 could possibly meet the standard. Whether or not the
16 Court ultimately agreed with what was said, it seems to
17 me the public has a real interest in whether or not
18 Harvard's witnesses told the truth. You remember the
19 exchange with Director McGraf about whether anything was
20 written down anywhere in the admissions office about
21 using race and why we had to call everybody back. I
22 think if somebody were indeed writing the book about
23 this trial to deprive them of this information and the
24 back and forth with the lawyers, particularly when, as
25 Ms. Ellsworth notes, I basically repeated all the same

1 allegations in closing argument in February, seems very
2 very strange. I'm not quite sure what the effort is
3 here, but it doesn't come close to meeting the standard
4 for preventing the public from finding out what the
5 lawyers said to you the factfinder surrounding the
6 trial.

7 THE COURT: Okay. So, guys, I don't want this to
8 linger, I want to resolve these issues as quickly as we
9 can.

10 So, Ms. Ellsworth, when do you think you can send
11 over the highlighted portions for me?

12 MS. ELLSWORTH: I can send it right now, your
13 Honor, I'll send it right in to Ms. Folan, and I'll copy
14 counsel.

15 THE COURT: All right, so she'll send that.

16 Is it, um -- obviously there's some of what the
17 press was initially seeking that's going to be unsealed.
18 Do you all want to unseal what you agree can be unsealed
19 now or do you want to do it as a package once all these
20 objections are resolved?

21 MR. MORTARA: I think probably it would be better
22 to do it as a package if it's going to be done quickly.

23 THE COURT: Okay. So what I would like to do, if
24 possible, I'm hoping to spend sometime around the
25 holidays working, um, so I'd like to, if possible, set

1 up a hearing on this towards the end of next week, I'll
2 give you my rulings, you can make whatever objections
3 you have on the record, and then we can release whatever
4 we're going to release by the end of next week.

5 Does that make sense to everybody?

6 MR. MORTARA: Fine with us, your Honor.

7 MS. ELLSWORTH: It's fine with us, your Honor.

8 There is a request that you might not have had a
9 chance to see yet from the reporters committee, to have
10 a redacted public version of what parties agree need not
11 be sealed publicly, which would be I think a version of
12 what we're going to send to Ms. Folan right now, but
13 with the portions highlighted and then redacted. I
14 don't take a view on whether your Honor should act on
15 that motion. But there is a request to have that sooner
16 rather than later. But we're fine with waiting until
17 next week and doing it all at once, particularly since
18 it seems like --

19 THE COURT: Yeah, I mean I didn't -- I saw that
20 they filed something, it was captioned as a "motion to
21 intervene," right?

22 MS. ELLSWORTH: That's correct.

23 THE COURT: So I saw the motion to intervene but
24 didn't read into the weeds of it. But now you're
25 telling me there was more to it than that?

1 So what we're thinking is that, um -- and again I
2 haven't read it. But you're saying that at some point
3 at the end of the day they want to be able to see how
4 much was redacted and in what context?

5 MS. ELLSWORTH: I don't want to speak for what
6 they're actually looking for, I just know that when we
7 met and conferred with them they wanted a redacted
8 public version filed. We of course couldn't make that
9 filing or provide that to them until the portions that
10 both parties agreed can be unsealed were in fact
11 unsealed by the Court, in case the Court had a different
12 view. So that is just one interim step that they
13 thought in order to be able to argue about why further
14 things should be unsealed.

15 If we're going to do this all in a span of a week
16 it's probably easier here to do it all at once and
17 probably better, but I just wanted to make you aware of
18 that request.

19 THE COURT: So obviously we could unseal certain
20 things without making it clear to them what remained
21 under seal or we could do what they're asking for, which
22 in some ways actually seems easier. But what's your
23 position on their requests? And I -- I'm asking you
24 about that generally because you're unencumbered about
25 whatever rulings I end up making, so. But do you have a

1 thought on it at this point?

2 THE COURT: Are you asking us, your Honor?

3 THE COURT: I was starting with Harvard, then I
4 was going to go to you. If you want to go first, you
5 can, Mr. Mortara.

6 MR. MORTARA: I'll go first.

7 THE COURT: Okay.

8 MR. MORTARA: Our view is that of course the stuff
9 that the parties don't think should be sealed, and
10 provided the Court agrees, should be released. To me
11 it's just a logistics issue why do two if we're going to
12 do another one next Friday? And it is just going to
13 leave them question-begging about what remains sealed.

14 THE COURT: So when we do release it, do you
15 envision releasing it in that kind of way, like
16 releasing all the sidebars with redactions, or are you
17 just -- like how are you envisioning it's going to be
18 released?

19 MR. MORTARA: Well of course if your Honor follows
20 our position, there would be only one redaction. But I
21 think it will be released with redactions. I had
22 understood your Honor's suggestion of a hearing next
23 week to be a suggestion that we have a public hearing
24 next week where objections would be laid on the record
25 about your decision to unseal things.

1 THE COURT: Well what I was actually -- what I was
2 thinking -- that wasn't what I was thinking. What I was
3 thinking was that we have one more sealed hearing where
4 I could give you my rulings and you could have one more
5 shot at it, or put your objections on the record, and
6 then we could do a public hearing in the hour after
7 that. But I was going to give you a chance to have a --
8 to have a conversation amongst ourselves before that
9 happened.

10 MR. MORTARA: Understood. I think at this point
11 we would -- our position is that we're sort of
12 indifferent as to whether there's an initial release and
13 a subsequent one, it's really up to the Court's
14 convenience. 7 days when the press has waited 4 1/2
15 years and apparently only got interested in this a few
16 weeks ago, I'm not sure is that big of a deal.

17 THE COURT: Okay.

18 Anything you want to add to that, Ms. Ellsworth?

19 MS. ELLSWORTH: No.

20 THE COURT: Okay. So why don't we do this. She's
21 going to -- I'll have a few days to look at it. Just
22 for the sake of not putting anybody under any crazy
23 pressure, why don't we meet again, this group, on the
24 15th and then, um, we can schedule a more public hearing
25 on that for the next day. And if something happens on

1 Thursday that makes us want to cancel Friday, we can
2 just go ahead and do that.

3 Does that make sense?

4 MR. MORTARA: Works for us, your Honor.

5 THE COURT: Um, Karen, I think I'm wide open on
6 Thursday, right?

7 THE CLERK: Yeah, we have a sentencing at 11:30,
8 and that's it.

9 THE COURT: A sentencing? I thought you moved it
10 from Thursday to Wednesday. Is that the one?

11 THE CLERK: No, that's a different one.

12 THE COURT: Who's being sentenced on Thursday?

13 THE CLERK: Nicole Benton.

14 THE COURT: Oh, yeah, at 11:30 on the 15th?

15 THE CLERK: Yes.

16 THE COURT: Okay.

17 MR. MORTARA: Your Honor, I have a small request
18 about the 16th when you're ready?

19 THE COURT: Okay, let's start with the 15th. I'm
20 wide open except for, you know, about say an hour at
21 11:30. Do you want to do it earlier than that?

22 MS. ELLSWORTH: If we could do it before then,
23 that would be better.

24 THE COURT: How about 10:00?

25 MR. MORTARA: Mr. Strawbridge, are you okay?

1 MR. STRAWBRIDGE: I'm okay as well, your Honor.

2 THE COURT: Okay. I'm very flexible. No one has
3 to like contort their schedules to do this if it's not a
4 good time. But hearing no objections, we'll have this
5 group on Thursday the 15th.

6 And then, um -- well now I'm looking at any Friday
7 and it's a bit of a mess.

8 Would you guys want to do this Thursday, then have
9 a more public hearing scheduled for Thursday afternoon
10 at 2:00?

11 MR. MORTARA: Works for me, your Honor.

12 MS. ELLSWORTH: I am tied up in the afternoon. I
13 I can try and move it on Thursday.

14 MR. MORTARA: My issue with Friday, your Honor, is
15 probably not being tied up in the similar way to
16 Mr. Ellsworth, but it's the last day of school and I
17 promised my daughter I would take her to see Avatar 2,
18 and I'd rather not be a liar about that. I have to pick
19 her up at about 3:00 Eastern and take her to a 3-hour
20 movie.

21 THE COURT: Okay, let's, um -- what about having a
22 public hearing at 10:00 on the 15th and doing this group
23 sometime on the 14th?

24 MR. MORTARA: Works for me, your Honor.

25 MS. GERSHENGORN: I'm in Judge O'Toole's courtroom

1 in a trial, um, on that day, I think, with a witness,
2 but I don't know -- if we can do it later? I don't know
3 how quickly it's going to be moving. And obviously, you
4 know, if we need to do it then, then Ms. Ellsworth can
5 cover for me.

6 THE COURT: I always like to see you, Ara.

7 MS. GERSHENGORN: Thank you. I think the
8 government is resting today, but I'm not sure. I think
9 it's been a week. But it's estimated to be a three-week
10 trial, so.

11 (Pause.)

12 MS. GERSHENGORN: If we can do later that day just
13 to sort of protect.

14 And maybe, Karen, and I apologize, I was going to
15 actually bother you, but I don't know if there's a way
16 for me to zoom in from the courtroom and I was wondering
17 whether the reception issue is horrible. But if I'm
18 down there, maybe there's a way to do that. Maybe I can
19 find that out off-line?

20 THE CLERK: Um, I'm not sure, to be honest. Like
21 from your phone, you mean, or you could --

22 MS. GERSHENGORN: No, like a zoom room or
23 something like that.

24 THE CLERK: Um, I don't believe we have anything
25 like that.

1 MS. GERSHENGORN: Yeah.

2 THE CLERK: Not that we get good reception anyway.

3 THE COURT: Well I can always do this from the
4 courtroom, right, and then couldn't you put the zoom
5 like up on the screen?

6 THE CLERK: Yeah, and then she could come into the
7 courtroom, you mean?

8 THE COURT: Right.

9 Hold on, let's just see if we can, um --

10 Ms. Ellsworth, is everybody else, except for
11 Mr. Mortara, okay on the 15th? Are you busy in the
12 afternoon, Ms. Ellsworth, is that what you said?

13 MS. ELLSWORTH: So is the 15th a Thursday, right?

14 THE COURT: Yeah.

15 MR. MORTARA: I'm okay on Thursday, but if it's
16 the 15th in the afternoon, that's a problem for me.

17 THE COURT: All right.

18 Is everybody -- Ms. Ellsworth, are you busy the
19 afternoon of the 15th?

20 MS. ELLSWORTH: Yes. And again it's something
21 that I could -- I can try and move it.

22 THE COURT: No, I'm happy to -- I'm accommodating
23 him and I'm trying to accommodate my own kids on the
24 afternoon of the 14th, so I'm happy to accommodate
25 whatever it is you have going too. You don't have to be

1 the only on unaccommodating.

2 Starting what time are you busy on the 15th?

3 MS. ELLSWORTH: So I am tied up on the 15th -- I
4 could be free beginning at about 4:00 p.m., so I could
5 do it in the later afternoon.

6 THE COURT: No, when are you --

7 MS. ELLSWORTH: I'm sorry, it's from 1:00 till
8 4:00.

9 THE COURT: 1:00 through 4:00.

10 So what if we got together at, um, 9:00, this
11 group, and then we had a public hearing scheduled for
12 10:30?

13 MR. MORTARA: Works for me.

14 MS. ELLSWORTH: All on the 15th?

15 THE COURT: Yes.

16 MS. ELLSWORTH: That's fine. Thank you.

17 THE COURT: So 9:00 would be, we'll call that,
18 "Private SFFA" and 10:30 will be "Public SFFA."

19 Karen, before you schedule that, does that work
20 for me?

21 THE CLERK: On the 15th, right?

22 THE COURT: Yes.

23 THE CLERK: Yes.

24 THE COURT: So we have SSFA at 9:00, SSFA at
25 10:30, and Benton at 11:30, right?

1 THE CLERK: Yup.

2 THE COURT: And there's no -- I guess I should
3 wait and see how much, if any, we leave redacted, but do
4 people think that 10:30 to 11:30 is going to be enough
5 to deal with the First Amendment people, an hour?

6 MR. MORTARA: I would think so given that there's
7 only about five total subject matters.

8 THE COURT: I thought there were three.

9 MR. MORTARA: Well there's three after you get rid
10 of Professor Acidiacona's grandmother and the one
11 exchange with a parent to Dean Karona.

12 THE COURT: Okay. Okay. All right.

13 All right, let's do that. If for some reason I
14 have an issue with this or run into anything when I look
15 at the transcript, I'll circle back. But let's try to
16 do that.

17 MS. ELLSWORTH: Thank you, your Honor.

18 MR. MORTARA: Thank you, your Honor.

19 THE COURT: Anything else for today?

20 (Silence.)

21 THE COURT: Okay. All right.

22 Thank you, gang. The case is recessed for today.

23 (Ends, 2:35 p.m.)

24

25

1 C E R T I F I C A T E
2

3 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
4 hereby certify that the forgoing transcript of the
5 record is a true and accurate transcription of my
6 stenographic notes, before Judge Allison D. Burroughs,
7 on Friday, December 9, 2022, to the best of my skill and
8 ability.

9
10 /s/ Richard H. Romanow 01-13-23
11

12 RICHARD H. ROMANOW Date
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